THE

AMERICAN LAW REGISTER.

SEPTEMBER 1885.

THE LAW OF JUDICIAL NOTICE.

As a general principle of trial-practice courts are to be guided, in reaching their conclusions, only by the evidence adduced in the particular case and by the rules of law applicable to it. There are, however, certain classes of facts which are not properly the subject of testimony, or which are regarded as universally established by common notoriety, and these, being held to rest within the knowledge of the judge, need not be proved in the case. Of such facts the court is said to "take judicial notice." It is the purpose of this article to describe in outline the chief subjects of judicial notice and the principles by which courts are directed in taking official cognisance of them.

I. *Constitution and Laws of the United States.*—In the first place, courts are always presumed to know the laws under which they act and which they are to administer. This is obviously essential to the first steps in judicial proceedings. And accordingly, any branch or division of the body of the law which applies to the territory within the jurisdiction of the court need not be established as matter of fact, but will be officially noted. And since the Constitution of the United States, the public acts of Congress, and the treaties made by the Federal Government with foreign nations form a part of the "supreme law of the land," it follows that all courts, whether national or state, will take judicial notice of their provisions.

As to treaties, see *United States* v. *Schooner Peggy*, 1 Cranch 103. So state courts are bound to take notice of the internal revenue laws of Congress, and to refuse to aid parties in any attempt to violate them, whether the point is raised by counsel or not: *Kessel* v. *Albertis*, 56 Barb. 362. The same is true of national bankrupt laws and their practical operation: *Mims* v. *Swartz*, 37 Texas 13. And it has been held that the President's proclamation of "universal amnesty and pardon" is a public act of which all the courts of the United States are bound to take notice and to which they are bound to give effect: *Armstrong* v. *United States*, 13 Wall. 154. So also courts will take notice of the government survey and the legal subdivisions of the public land: *Atwater* v. *Schenck*, 9 Wis. 160. But the state courts are not bound to notice the *rules* of the departments of the federal government, or of the board of land commissioners or surveyor-general, *e. g.*, that original papers are not to be taken from their files. Such rules, if essential, must be shown by affidavit or otherwise: *Hensley* v. *Tarpey*, 7 Cal. 288. Nor are courts required to know officially the various orders issued by a military commander in the exercise of the military authority conferred upon him: *Burke* v. *Miltenberger*, 19 Wall. 519.

II. *Public Laws of the State.*—Since the common or unwritten law of the state, together with its general and public statutes, constitute an integral part of the domestic jurisprudence, these also are proper subjects for the judicial cognisance of the court: *Lane* v. *Harris*, 16 Ga. 217. As also the time when a public law takes effect: *State* v. *Bailey*, 16 Ind. 46. And it is held that the appellate court, if in doubt as to the true reading of a statute, will of its own motion inform itself thereof by referring to the original act on file in the office of the secretary of state: *Clare* v. *State*, 5 Iowa 509. Whether or not the official knowledge of the court should be understood to extend to the journals of the two houses of the legislature, is a mooted question. It has been so held in Alabama and Michigan: *Moody* v. *State*, 48 Ala. 115; *People* v. *Mahaney*, 13 Mich. 481; and denied elsewhere: *Grob* v. *Cushman*, 45 Ill. 119; *Coleman* v. *Dobbins*, 8 Ind. 156. But at any rate it appears to be settled that when it becomes the duty of the court to inquire into the validity or constitutionality of a statute, recourse may be had to the legislative journals. The courts are required to be acquainted with the whole body of domestic law; but of course it is an essential prerequisite to such acquaintance that

they should have knowledge of any acts which are invalid, unconstitutional, or not in force. The judges must be able to determine whether or not a bill has been passed in accordance with all the constitutional provisions, whether or not it received the requisite majority to pass it over the governor's veto, whether or not it answers the law in respect to singleness of subject-matter and title, and so on; and such determination becomes impossible unless reference can be made to the official records of the legislative body. *People* v. *Mahaney*, 13 Mich. 481; *Moody* v. *State*, 48 Ala. 115; *Opinion of the Judges*, 35 N. H. 579; *Pangborn* v. *Young*, 32 N. J. Law 29. But it is equally settled that the court cannot go behind the records of the legislature to inquire into the regularity of their proceedings in passing an act: *People* v. *Devlin*, 33 N. Y. 269. On the whole, we are inclined to favor the liberal and wise rule laid down by the United States Supreme Court in the case of *Gardner* v. *The Collector*, 6 Wall. 511: "We are of opinion, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." But in considering the proceedings of the legislature, the court has no judicial knowledge whether or not there are proper and legitimate modes of expending money in procuring the passage of an act; and therefore it cannot say that an averment in an answer of such expenditure, with such purpose and result, is either immaterial or vicious: *Judah* v. *Trustees*, 16 Ind. 56.

Nor is the court restricted, in noticing the laws of the state, to the allegations of the pleader. For example, where a bill concerns the interests of the state and is professedly for their protection, the court will take official notice of the established law, even though it contradicts such allegations: *State* v. *Jarrett*, 17 Md. 309. It follows as a corollary from what has already been said that the court will take judicial notice of the *repeal* of any law of the state: *State* v. *O'Connor*, 13 La. Ann. 486. Even where proceedings are begun under a certain statute, and, pending an appeal, that statute is repealed, the appellate court is bound to notice such repeal,

though it forms no part of the case as reported for their judgment: *Springfield* v. *Worcester*, 2 Cush. 52. The laws relating to highways are public statutes of which the courts will take judicial notice: *Town of Griswold* v. *Gallup*, 22 Conn. 208. And the same is true of bank-charters: *Davis* v. *Bank of Fulton*, 31 Ga. 69; though see *Bank* v. *Gruber*, 87 Penn. St. 468.

But private and special acts of the legislature, relating only to a limited number of persons, are not laws of which the courts are required to take official cognisance. This rests upon two reasons. In the first place, they are not matters of such public notoriety that judges are presumed to know them at all events. And secondly, they are not in reality the public laws of the state, but rather in the nature of a contract between the legislature, in their representative capacity, and the individuals who are supposed to derive benefit from them. *Leland* v. *Wilkinson*, 6 Pet. 317; *Timlow* v. *Reading Railroad*, 10 W. N. C. 436; *Bank* v. *Gruber*, 87 Penn. St. 468; *Legrand* v. *Sidney College*, 5 Munf. (Va.) 324. It is often essential to determine whether a given act is public or private, and to this end the court in Indiana has laid down the following rule: To constitute a statute a public act it is not necessary that it should extend to all parts of the state; it is a public act if it extends equally to all persons within the territorial limits described in the statute: *Levy* v. *State*, 6 Ind. 281. Yet a special act for the survey of a particular tract of land is not such a public law as the courts are required to know judicially: *City of Allegheny* v. *Nelson*, 25 Penn. St. 332. And, as further illustrating this distinction, it is held that while the court knows judicially all the statutes under which plank-road companies are organized, yet it cannot know judicially under which one any particular company was formed, or whether it has not adopted the provisions of some other act: *Danville, &c., Co.* v. *State*, 16 Ind. 456. In accordance with the principles of the rule above stated, it is decided that an act relating to the powers of a single municipal corporation is in its nature public, though not in terms declared to be so, and must be judicially noticed by the courts; *Fauntleroy* v. *Hannibal*, 1 Dill. 118. So also special laws enacted by a territorial legislature, creating towns or cities municipal corporations, are public acts: *Prell* v. *McDonald*, 7 Kans. 426. And the courts will take judicial notice of the power and authority of a city to improve its streets: *Macey* v. *Titcombe*, 19 Ind. 135; and that the streets of a

city are public highways: *Whittaker* v. *Eighth Ave. Railroad Co.*, 5 Robt. (N. Y.) 650; but not of the width of the streets or of the side-walks, in a city, nor of the city ordinances establishing the same or prescribing or limiting their extent: *Porter* v. *Waring*, 69 N. Y. 250. It is well settled that courts of general jurisdiction, established by the authority of the state, cannot take judicial notice of the city ordinances or police regulations of any municipal corporation: *Case* v. *Mobile*, 30 Ala. 538; *Porter* v. *Waring*, *supra*. But a *city* court will officially notice such ordinances; because it stands in the same attitude towards the municipal laws of the city that a state court occupies in reference to the public laws of the state: *State* v. *Leiber*, 11 Iowa 407. It appears that private laws, though requiring proof by evidence, need not be specially pleaded, but may be exhibited as other documents, unless admitted by consent: *Legrand* v. *College*, 5 Munf. (Va.) 324.

III. *International Law.*—The law of nations, being co-extensive with civilization, must also be judicially noticed by all courts. Thus the law merchant, so far as the same is a part of the private international law, is not a subject for proof as matter of fact, but will be noticed and applied by the court: *Jewel* v. *Center*, 25 Ala. 498. So also it has been said in Connecticut, "By common consent and general usage, the seal of a court of admiralty has been considered as sufficiently authenticating its records. No objection has prevailed against the reception of a decree of a court acting on the law of nations when established by its seal. The seal is deemed to be evidence of itself, because such courts are considered as courts of the whole civilized world, and every person interested as a party." *Thompson* v. *Stewart*, 3 Conn. 181. And the same is equally true of the general principles of the laws of navigation. Thus, where a set of rules of navigation (prescribing the different kinds of lights to be used on vessels) has been issued by a foreign government, and accepted as obligatory by more than thirty of the principal commercial nations of the world, the courts may take judicial notice of the fact that by common consent of mankind these rules have been acquiesced in as of general obligation. The law maritime does not require proof as a foreign law: *The Scotia*, 14 Wall. 170. So also the national flag and seal of all civilized countries is recognised by the courts: *Watson* v. *Walker*, 23 N. H. 496. And to further illustrate the same principle—acts which are criminal by the common law and the laws of all civilized countries will be pre-

sumed to be contrary to the laws of any state of the Union: *Cluff* v. *M. B. Ins. Co.*, 13 Allen 308.

As a principle somewhat analogous to the preceding, it is held that the official seal of a notary public is self-proving everywhere; in other words, that the courts of one jurisdiction will take notice of the authority of a notary public, commissioned in another state to administer oaths and perform other duties incident to his official capacity, without any other authentication than his signature and notarial seal, and will infer therefrom that he was duly appointed by the governor of such state: *Denmead* v. *Maack*, 2 McArthur 475: *Browne* v. *Philadelphia Bank*, 6 S. & R. 484.

IV. *Judicial Notice of State Law in the Federal Courts.*— Whenever questions arise in the courts of the United States which depend upon points of state law, the adjudicating tribunals will take judicial notice of all such laws: *Merrill* v. *Dawson*, 1 Hemp. 563; *Jones* v. *Hays*, 4 McLean 521; *Mewster* v. *Spalding*, 6 Id. 24; *Pennington* v. *Gibson*, 16 How. 65. So the Supreme Court will take official cognisance of any law of any state which may be necessary to the determination of the questions before it, and the circuit courts will notice the laws of all states within their territorial jurisdiction. This principle may rest upon either of two foundations. (1.) "The circuit courts of the United States are created by Congress, not for the purpose of administering the local laws of a single state alone, but to administer the laws of all the states of the Union, in cases to which they respectively apply:" *Owings* v. *Hull*, 9 Pet. 625; and since, as we have already seen, every court is presumed to know the whole body of the law which it is intended to administer, it follows that these courts must be acquainted with the state laws. (2.) In the contemplation of the federal tribunals the states are not "foreign," but are all component parts of the general government and territorially within its jurisdiction: *Bennett* v. *Bennett*, Deady 309. In this matter the United States courts are governed by the same rules which direct the tribunals of the particular state; *e. g.* as respects the difference between public and private statutes, and the fact that the latter cannot be judicially noticed. So, where a certain act of incorporation is declared to be a public act, so that the state courts may include it within their judicial notice, the federal courts will do likewise: *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227. And so of a statute giving a county authority to subscribe for stock in a

railroad company, and to issue its bonds in payment thereof: *Smith* v. *Tallapoosa Co.*, 2 Woods 574. To this rule, however, there is an important exception, viz.: that while the courts of one state cannot generally notice the laws of a sister state, the judicial knowledge of a national court is not confined to the enactments of the state where it happens to be sitting at the particular time, but extends at all times to the laws of all other states within its jurisdiction. For it would be absurd to make the scope of the judicial knowledge shift and vary in correspondence with the venue of the particular action.

As a general rule, when the proper construction of a state statute has been fixed and settled by the court of last resort in that state, the same construction will be adopted by the federal courts sitting within her borders: *Elmendorf* v. *Taylor*, 10 Wheat. 152.

V. *Laws of Sister States, how regarded.*—It is a general rule that foreign laws are matters of fact to be pleaded and proved. As municipal laws have no extra-territorial force, they cannot be regarded, strictly speaking, as *law* when they are brought before a tribunal foreign to the jurisdiction that enacted them. And the only reason why such tribunals enforce them at all is, because it is supposed that contracts made in foreign countries are made with reference to the laws there prevalent, and that those laws have thus become incorporated in such contracts. To enforce the contracts, therefore, it is necessary to enforce the laws. But as they are not proper subjects for the administration of the domestic tribunal, they must be alleged as matter of fact, and their existence and tenor must be established by testimony. Now the states of the American Union, except in so far as it is otherwise provided in the federal constitution, are regarded as independent sovereignties, and their mutual relations as those of foreign powers in close alliance and friendship. It follows from this that the laws of each state are "foreign" in the other states, and cannot be judicially noticed, but must be pleaded and proved as facts. This proposition is abundantly supported by the authorities: *State* v. *Stade*, 1 D. Chip. 303; *Territt* v. *Woodruff*, 19 Vt. 182; *Hempstead* v. *Reed*, 6 Conn. 480; *Kline* v. *Baker*, 99 Mass. 253; *Knapp* v. *Abell*, 10 Allen 485; *Ames* v. *McCamber*, 124 Mass. 85; *Miller* v. *Avery*, 2 Barb. Ch. 582; *Hosford* v. *Nichols*, 1 Paige Ch. 226; *Dorsey* v. *Dorsey*, 5 J. J. Marsh. 280; *Whitesides* v. *Poole*, 9 Rich. (S. C.) 68; *Simms* v. *Southern Ex. Co.*, 38 Ga. 129; *Shed* v. *Augustine*, 14

Kan. 282; *Irving* v. *McLean*, 4 Blackf. 52; *Rothrock* v. *Perkinson*, 61 Ind. 39; *Hyman* v. *Bayne*, 83 Ill. 256; *Carey* v. *Railroad*, 5 Iowa 357; *Brimhall* v. *Van Campen*, 8 Minn. 13; *Rape* v. *Heaton*, 9 Wis. 328; 1 Daniel on Negotiable Instruments, § 865.

But there are certain modifications which have been engrafted upon this rule. Thus, where one state recognises acts done in pursuance of the laws of another state, its courts will take judicial notice of those laws, so far as may be necessary to determine the validity of the acts alleged to be in conformity with them: *Carpenter* v. *Dexter*, 8 Wall. 513. So also, where a question arises under the Act of Congress requiring that full faith and credit be given in each state to the public acts, records, and proceedings of every other state, the domestic tribunal will take judicial notice of the local laws of the state from which the record comes; for the very sensible reason that their proceedings, in such case, are subject to review in the Supreme Court of the United States, and since in *that* court the states are not regarded as foreign, and their individual laws are officially noticed, the same rule should obtain, under these circumstances, in the state courts. As remarked by WOODWARD, J., "It would be a very imperfect and discordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows that, in questions of this sort, we should take notice of the local laws of a sister state in the same manner the Supreme Court of the United States would do on a writ of error to our judgment:" *State of Ohio* v. *Hinchman*, 27 Penn. St. 479; *Paine* v. *Insurance Co.*, 11 R. I. 411; *Rae* v. *Hulbert*, 17 Ill. 572; *Butcher* v. *Bank*, 2 Kans. 70. It has been said, in Georgia, that the judges, on the trial of a cause, may proceed on their personal knowledge of the laws of another state, and that their judgment will not be reversed, in consequence of their so doing, unless it appears that their decision was erroneous as to those laws: *Herschfeld* v. *Dexler*, 12 Ga. 582. But this seems to be an isolated case. As showing the practical operation of this rule, we may cite the following: The courts cannot judicially know the rate of legal interest in a sister state: *Clarke* v. *Pratt*, 20 Ala. 470; *Dorsey* v. *Dorsey*, 5 J. J. Marsh. 280; nor what share would fall to a given heir of an intestate who died domiciled in another state: *McDaniel* v. *Wright*, 7 J. J. Marsh. 475; in an action on a contract made in another state, and specifying no particular place of

performance, the court will not, on a demurrer to the declaration, take judicial notice of a law of such state which, applied to the contract, would render it void: *Jones* v. *Palmer*, 1 Dougl. (Mich.) 379; an averment of *lis pendens* in the courts of another state does not necessarily import that the defendant has appeared or been served with process, and hence is not a good plea in abatement: *Newell* v. *Newton*, 10 Pick. 470.

Another important exception to the rule that the laws of one state are foreign to the courts of another and must be pleaded and proved, is found in the fact that where one state is formed out of territory originally belonging to another, the courts of the new state will recognise as a part of their domestic jurisprudence all laws of the other state which were in force at the time of the separation, unless repealed, directly or by implication, in the new state. Thus the courts of Kentucky will take judicial notice of the laws of Virginia existing before the former state became independent of the latter: *Delano* v. *Jopling*, 1 Litt. (Ky.) 417. And the same is true of states which were formerly within the dominion of foreign nations. So the Spanish laws which prevailed in Louisiana before its cession to the United States, and upon which the titles to land in that state depend, must be judicially noticed and expounded by the courts of Louisiana: *United States* v. *Turner*, 11 How. 663. So also our courts will take judicial notice of the statute law of Great Britain in force before the separation; but the statutes of that country created since the revolution cannot be judicially noticed or established before our courts, except in the same manner and by the same proofs as the criminal laws of any foreign state: *Ocean Ins. Co.* v. *Fields*, 2 Story 59.

VI. *Foreign Laws—How Proved.*—The laws of any foreign state or country being thus seen to be without the judicial cognisance, we are next to consider the methods of proving them before the court when they become material to the controversy. A concise rule has been laid down by the United States Supreme Court, as follows: "The existence of a foreign law, written or unwritten, cannot be judicially noticed, unless it be proved as a fact, by appropriate evidence. The written foreign law may be proved by a copy of the law properly authenticated. The unwritten must be proved by the parol testimony of experts:" *Ennis* v. *Smith*, 14 How. 426; *Frith* v. *Sprague*, 14 Mass. 455. In regard to the written law, and first as to the mode of authenticating it, it is held that the great seal of

a state affixed to the exemplification of a law is sufficient proof of itself, inasmuch as the public seal is a matter of notoriety and will be judicially noticed as a part of the law of nations acknowledged by all: *Robinson* v. *Gilman*, 20 Me. 300; *State* v. *Carr*, 5 N. H. 367. And it has been decided by the supreme federal tribunal that, under the Act of May 26th 1790, prescribing the manner in which the public acts, records and proceedings of the several states shall be authenticated, no other authentication of an act of the legislature is required than the annexation of the seal of the state; and it is presumed that the person who affixed the seal had competent authority to do so: *United States* v. *Amedy*, 11 Wheat. 392. In regard to foreign countries, however, it is essential that the person certifying the exemplification of the law should be one whose duty and prerogative it is to do so. Thus, it is not a consular function to authenticate the laws of a foreign state, and the certificate of a United States consul to that effect is not evidence: *Church* v. *Hubbart*, 2 Cranch 187. And again, "the certificate and seal of the minister resident from Great Britain in Hanover is not a proper authentication for the proceedings of a foreign court, or of the proceedings of an officer authorized to take depositions. It is not connected in any way with the functions of the minister. His certificate and seal could only authenticate those acts which are appropriate to his office:" *Stein* v. *Bowman*, 13 Pet. 209. The general rule, then, is that the exemplification must be under the great seal of the state. As between the several states of the Union, however, a more liberal rule obtains. In general, the written laws of a sister state may be proved by printed volumes, printed by the authority of such state, and purporting to contain the public acts of its legislature. In point of fact, this rule is dictated by principles of convenience, and affords a method of proof more satisfactory even than that by certified copy. It may now be regarded as established in a majority of the states. Thus it is said in Pennsylvania: "Printed volumes purporting to be on the face of them the laws of a sister state, are admissible as *prima facie* evidence to prove the statute laws of that state:" *Mullen* v. *Morris*, 2 Penn. St. 87. And in Massachusetts it is held that where a printed volume of the laws of another state contains the words "By authority" on the title-page, that is a sufficient authentication to allow it to be introduced in evidence: *Merrifield* v. *Robbins*, 8 Gray 150. In New Hampshire it was

once said that such printed volume was admissible if, according to the testimony of a counsellor of that state, it was there cited and received by the courts: *Lord* v. *Staples*, 23 N. H. 448; but a later decision holds it sufficient if it purports on its face to be printed by authority: *Emery* v. *Berry*, 28 N. H. 487. And see, to the same effect, *Thomas* v. *Davis*, 7 B. Mon. 227; *Clanton* v. *Barnes*, 50 Ala. 260; *Barkman* v. *Hopkins*, 11 Ark. 157; *State* v. *Abbey*, 29 Vt. 60; *Simms* v. *Southern Ex. Co.*, 38 Ga. 129; *Rothrock* v. *Perkinson*, 61 Ind. 39; *Bradley* v. *West*, 60 Mo. 34. A contrary doctrine is held in North Carolina: *State* v. *Twitty*, 2 Hawks 441. Whether or not a similar authentication is sufficient for the statute law of a foreign country is a question not yet entirely decided; but the current of judicial opinion seems to require that the volume offered to prove such laws must be shown, by extraneous evidence, to be duly authorized by the government of the foreign country. Thus, a printed copy of the Irish statutes, when supported by the oath of an Irish barrister to the effect that he had received them from the king's printer in Ireland, and that they are good evidence there, may be used to show the laws of Ireland: *Jones* v. *Maffet*, 5 S. & R. 523. So, also, where a printed volume of the laws of a British province is shown by the testimony of witnesses to have received the sanction of the executive and judicial officers of the province, as containing its laws: *Owen* v. *Boyle*, 15 Me. 147. But an act of the Parliament of Great Britain cannot be proved by an alleged transcript of it in the "Canada Gazette," although the latter is an official newspaper: *Beach* v. *Workman*, 20 N. H. 379.

It is generally settled that the common or unwritten law of a foreign state may be proved by parol evidence of experts. And to constitute one an expert, for this purpose, it is not necessary that he should be a lawyer, provided it appears that he has been in a position which might reasonably be supposed to require familiarity on his part with such laws. Thus it is said: "The law of a foreign country on a given subject may be proved by any person who, though not a lawyer, or not having filled any public office, is or has been in a position to render it probable that he would make himself acquainted with it;" *American, &c., Co.* v. *Rosenagle*, 77 Penn. St. 515; *Hall* v. *Costello*, 48 N. H. 179. The construction given to a statute of a foreign state, by usage and by judicial decisions, is a part of its unwritten law, and should be proved by the testimony

of experts: *Dyer* v. *Smith*, 12 Conn. 384. In Massachusetts it is provided by statute that the books of reports of cases adjudged in the courts of other states are admissible in evidence to prove the unwritten law of those states: *Cragin* v. *Lamkin*, 7 Allen 395; *Ames* v. *McCamber*, 124 Mass. 91.

While it is firmly settled that foreign laws must be proved as *facts*, there is much diversity of opinion as to whether the proof of them should be addressed to the court or to the jury. On the one hand, it is the province of the jury to decide upon questions of fact. On the other hand, it is the undoubted prerogative of the court to rule upon matters of law. Judge STORY (Conflict of Laws, § 638) says: "The court are to decide what is the proper evidence of the laws of a foreign country; and, where evidence is given of those laws, the court are to judge of their applicability, when proved, to the case in hand." And the same rule has been asserted in New Hampshire: *Pickard* v. *Bailey*, 26 N. H. 152. But in Massachusetts it is held that the construction to be put upon foreign laws after they are proved is a question for the jury, with such instructions to assist them in ascertaining and applying the law as may be deemed proper: *Holman* v. *King*, 7 Met. 384. And again: "When the evidence consists of the parol testimony of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. * * * Where the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone:" *Kline* v. *Baker*, 99 Mass. 254. Perhaps the rule that is most closely in accordance with both reason and elementary law is that laid down in the following language: "The existence of a foreign law is a fact. The court cannot judicially know it, and therefore it must be proved; and the proof, like all other, necessarily goes to the jury. But when established, the meaning of the law, its construction and effect, is the province of the court. It is a matter of professional science; and, as the terms of the law are taken to be ascertained by the jury, there is no necessity for imposing on them the burden of affixing a meaning on them, more than on our own statutes. It is the office of reason to put a construction on any given document, and therefore it naturally arranges itself among the duties of the judge." *State* v. *Jackson*, 2 Dev. (N. C.) 563. These latter views are logi-

cally, ably, and dogmatically supported by the learned author of Bishop on Marriage and Divorce, Vol. I., § 419.

VII. *Presumption that the Foreign Law is the same as Our Own.*—We frequently see it stated that the law of any foreign country is presumed to be the same as our own. This means that where a contract, or other matter in dispute, is on its face to be governed by a foreign law, and no proof of that law has been adduced, and it is not such that the court can take judicial notice of it, the adjudicating tribunal will proceed upon the basis of its *own* laws, not being informed in what respect the foreign law differs, or presuming, within certain restrictions, that it is identical. Thus, as a general rule, it is presumed that the "common law" prevails in each of the United States: *Monroe* v. *Douglass*, 5 N. Y. 447; *Whitford* v. *Panama Railroad Co.*, 23 Id. 465; *Copley* v. *Sandford*, 2 La. Ann. 335; *Rape* v. *Heaton*, 9 Wis. 328; 1 Whart. on Ev., § 314. In illustration of this rule, it is held that champerty, being an offence at common law, is to be presumed to be against the law of another state, the contrary not appearing: *Thurston* v. *Percival*, 1 Pick. 415. Again, in Massachusetts the giving of a promissory note is evidence of payment of a pre-existing debt—the law will be presumed the same in Maine: *Ely* v. *James*, 123 Mass. 44. Whether or not the *statutes* of another state are presumed the same as ours is a question propounded, but not decided, by the New York court in the case of *McCulloch* v. *Norwood*, 58 N. Y. 563. Probably not; since foreign statute-law is so easily susceptible of proof.

There are several exceptions to this rule of presumption. In the first place, it is plainly in accordance with natural justice that all contracts and judicial proceedings had abroad should be presumed legal and valid, until the contrary is shown. Hence, if a contract, made with reference to foreign laws and to be governed thereby, would be void or illegal by the law of the forum, the court will not presume the foreign law to be the same as the domestic, for the mere purpose of defeating the contract, but on the contrary, in the absence of proof, will understand the contract to be valid by the foreign law. In other words, the presumption of legality and validity is stronger than the presumption of identity of laws: 1 Bishop on Mar. & Div., § 412; 1 Whart. on Ev., §§ 314, 1250; *Jones* v. *Palmer*, 1 Dougl. (Mich.) 379. For example, if the defence is *usury*, and the contract would be usurious under the

domestic law, the court will not presume that the *lex loci contractus* is identical and so overthrow the contract; the defendant must prove the foreign law as matter of fact: *Campion* v. *Kille*, 15 N. J. Eq. 476; *Cutler* v. *Wright*, 22 N. Y. 472; *Davis* v. *Bowling*, 19 Mo. 651. So also courts will not take judicial notice of the *revenue* laws of another country: *Randall* v. *Rensselaer*, 1 Johns. 94. So where suit was instituted upon a promissory note made in Jamaica by one who was under age, and no evidence was offered of the laws of Jamaica, it was held that the court would not presume those laws to be the same, in respect to minority as a defence, as the laws of the forum, and the plaintiff was entitled to recover: *Thompson* v. *Ketcham*, 8 Johns. 190. In the second place, this presumption cannot reasonably be extended to countries whose usages and customs are wholly different from ours, and whose system of laws has nothing in common with our own jurisprudence, either in respect of origin, traditions or theories. Thus there is no presumption that the common law is in force in Russia: *Savage* v. *O'Neil*, 44 N. Y. 298. Nor among the Cherokee nation: *Duval* v. *Marshall*, 30 Ark. 230. Nor in Turkey: *Dainese* v. *Hale*, 91 U. S. 13. Nor, finally, can the presumption of identity of laws be attached to any local idiosyncrasies or peculiarly intra-territorial regulations. As remarked by a distinguished writer, "It would be preposterous to assume, even *prima facie*, that our Statute of Frauds, or our fluctuating liquor laws, or our laws for the collection of revenue, prevail in Japan." 1 Bishop M. & D., § 412. And by another: "Nor can a judge, as to a notoriously peculiar domestic rule, assume without absurdity that such rule obtains in a sister state." 1 Whart. on Ev., § 315. In conclusion of this part of our subject, it is held that where a statute of another state has once been recognised as the law of that state by a decision of the domestic courts, the latter will thereafter take judicial cognisance of the statute, and until it be proved that the law has been changed, will presume it still in existence: *Graham* v. *Williams*, 21 La. Ann. 594.

VIII. *Judicial Notice taken of other Courts and their Judges.* —As a general rule, all courts in the United States will take judicial notice of the fact that tribunals are established in the several states for the adjustment of controversies and the ascertainment of rights: *Dozier* v. *Joyce*, 8 Port. (Ala.) 303. But in regard to recognising particular courts in other states, the practice is not so

harmonious. Thus the courts of Kansas will take judicial notice of the constitutions of sister states, and in an action on a judgment of the Court of Common Pleas in Pennsylvania, will recognise the fact that by the constitution of that state that court is a common-law court having original and appellate jurisdiction: *Butcher* v. *Brownsville*, 2 Kans. 70. On the other hand, the courts of Wisconsin will not take judicial notice that there are county judges in New York or that they are authorized to administer oaths: *Fellows* v. *Menasha*, 11 Wis. 558. Of course all courts will officially recognise those which are superior to them or co-ordinate with them, and their practice. And it may now be regarded as settled that appellate courts will take notice of the inferior courts and who are their judges: *Tucker* v. *State*, 11 Md. 322; *Kilpatrick* v. *Commonwealth*, 31 Penn. St. 198. But see *Ripley* v. *Warren*, 2 Pick. 596. So the circuit court will take judicial cognisance of who are the justices of the peace for the county in which it is held, and will require no proof of their official character unless that particular point is directly in issue: *Chambers* v. *People*, 5 Ill. 351; *Hibbs* v. *Blair*, 14 Penn. St. 413. And the Supreme Court of a state should take notice of the times prescribed by law for holding the terms of the various courts of the state: *Lindsay* v. *Williams*, 17 Ala. 229; *McGinnis* v. *State*, 24 Ind. 500; *Davidson* v. *Peticolas*, 34 Tex. 27. But the superior courts will not take judicial notice of the customs, rules, practice or proceedings of inferior courts of limited jurisdiction, unless justice requires it, when revising the judgments of such courts: *March* v. *Commonwealth*, 12 B. Mon. 25. Or unless, we may add, the organization and practice of such courts is regulated by statute, in which case it would be included in the judicial knowledge which the court has of all the laws of the state. In California it is stated that where a party relies upon the rules of practice of the district courts he must have them incorporated in the record, as the Supreme Court cannot judicially notice them: *Cutter* v. *Caruthers*, 48 Cal. 178. The court will always take judicial notice of all prior proceedings in a case; hence it is unnecessary to offer evidence of a former trial and the verdict returned on such trial, on the hearing of a plea in bar of "once in jeopardy" by such trial and verdict: *State* v. *Bowen*, 16 Kans. 475. And where an appearance is entered in the inferior court, and is not withdrawn, and an appeal is taken to this court, and the judgment below is reversed and remanded, and, after proceedings

there, another appeal is taken to this court, this court will judicially know what attorneys have appeared in the cause: *Symmes* v. *Major*, 21 Ind. 443.

IX. *Executive and other Officers.*—The courts of a state are presumed to know who the state executive may be at any time when the fact may be called in question: *Dewees* v. *Colorado County*, 32 Texas 570. So it will be judicially noticed that a certificate, indorsed on the bond of a county treasurer by the deputy auditor-general of the state, was so indorsed by an officer of the state: *People* v. *Johr*, 22 Mich. 461. And the same is true of the officers of a county. Thus courts will officially notice the appointment or election of sheriffs, as well as of other executive or administrative officers, and treat them as officers *de facto* when the validity of their acts is called in question in a collateral manner; *Thompson* v. *Haskell*, 21 Ill. 215; *Dyer* v. *Flint*, Id. 80. So of tax-collector and his signature: *Wetherbee* v. *Dunn*, 32 Cal. 106. And of the genuineness of the signatures of the county officers and of such deputies as the law authorizes: *Himmelmann* v. *Hoadly*, 44 Cal. 213. But see, as a peculiar case, *Shropshire* v. *State*, 12 Ark. 190. It is well settled that a court may take judicial notice of who are its own officers: *Dyer* v. *Last*, 51 Ill. 179. And also of the genuineness of its own records and of the signatures of its own officers: *State* v. *Postlewait*, 14 Iowa 446.

X. *Historical Events.*—All courts are presumed to have an official knowledge of general history, and they will require no proof of events and circumstances which were of such universal notoriety and affected so large a proportion of the population, at the time of happening or afterwards, that they may be regarded as a part of the public history of the country. Further than this it would be extremely difficult to lay down an affirmative principle of distinction. Such matters are judicially noticed by reason of their *notoriety;* and Wharton's description of notoriety is as follows: "Evidence is not needed to establish that which is so notorious to persons of ordinary intelligence that it either admits of no doubt, or could at the moment be established by a profusion of indisputable testimony:" Law of Evidence, Vol. I., § 330. As illustrations of this public notoriety, though not as embodying a principle of distinction, may be cited the following instances: The separation of the Methodist Church, in 1844, into two bodies north and south of a line, was an event that connected itself with and formed a part of the history

of the country, and hence will be judicially noticed: *Humphrey* v. *Burnside*, 4 Bush (Ky). 215. The courts of Alabama will officially notice the fact, as a part of contemporary history, that in 1867 the people of that state were in a condition of great financial embarrassment and insolvency, and that in consequence of such state of affairs it may not have been practicable for a guardian, at that time, to make a safe investment of a large sum of money, without some delay after its receipt: *Ashley* v. *Martin*, 50 Ala. 537. The court will judicially notice the agreement between Lord Baltimore and William Penn relating to the boundary line between the two provinces, as it is a part of the public history of Pennsylvania: *Thomas* v. *Stigers*, 5 Penn. St. 480. So also the history of the Six Nations of Indians is a part of the history of New York of which the courts will take judicial notice, as well as of the extinction of the Indian title to a certain tract of land within the state: *Howard* v. *Moot*, 64 N. Y. 271. But it is said that while courts will judicially notice matters of public history, yet it is generally necessary to produce *some* evidence upon the point sought to be established, as by contemporary chronicles, &c.: *McKinnon* v. *Bliss*, 21 N. Y. 206.

XI. *The Course of Nature.*—In the next place, it is well settled that judicial notice will be taken of the ordinary course of nature and the rotation of the seasons; and so of the general course of agriculture, with reference, for example, to the maturity of the crops: *Floyd* v. *Ricks*, 14 Ark. 286. So a court will take notice without proof that a mortgage made in January upon a cotton crop is upon a crop not yet in being: *Tomlinson* v. *Greenfield*, 31 Ark. 557. But on the other hand, it cannot be judicially known to the court that the concentric layers in the trunk of a tree mark each a year's growth of the tree and thus indicate its age: *Patterson* v. *McCausland*, 3 Bland (Md.) 69. Nor can notice be taken of mere vicissitudes of climate or of the seasons or special alternations of weather: *Dixon* v. *Nicholls*, 39 Ill. 372. So it is said that the almanac has long been regarded and held as a part of the law of the land. And the court will notice the coincidence of days of the month with days of the week, as shown by the almanac: *Allman* v. *Owen*, 31 Ala. 167. As, if a bill or note bears date on a certain day of the month, the court will judicially notice if such day were Sunday: 1 Daniel on Negot. Instr., § 70. And further, the court will take judicial notice that the date on which a judgment by

default was recorded in a given year was or was not a day of a term such that the same was not prematurely rendered: *Bethune* v. *Hale*, 45 Ala. 522. Moreover, the ordinary limitations of human life are a proper subject for judicial cognisance. For example, where it is evident, from the time of their ancestor's death, that his children must have arrived at full age before suit was commenced, the court will judicially notice such fact: *Floyd* v. *Johnson*, 2 Litt. (Ky.) 109.

XII. *Geographical Features and Civil Divisions.*—Courts are bound to take judicial notice of the leading geographical features of the country; but the minuteness of such knowledge is inversely proportional to the distance, being much more specific and detailed in regard to the territory over which the court has jurisdiction than with respect to foreign lands or even different states. Thus courts will be presumed to be acquainted with the great geographical features of the states—such as lakes, rivers and mountains, and of the division of the state into counties, cities and towns, and their relative position: *Winnipiseogee Lake Co.* v. *Young*, 40 N. H. 420; *Hinckley* v. *Beckwith*, 23 Wis. 328; *Goodwin* v. *Appleton*, 22 Me. 453; *Martin* v. *Martin*, 51 Id. 366. And of the navigability of streams: *Neaderhouser* v. *State*, 28 Ind. 257. But not of the precise boundaries and distances, nor of the local situation and distances of the different places in counties from each other: *Goodwin* v. *Appleton*, *supra*. But the area of an established county is known to the court without proof: *Commissioners* v. *Spitler*, 13 Ind. 235.

In regard to the names of towns and their situation, (a controverted point), it was said in Illinois that where the premises in litigation were described as "lot five in block one in Haley's addition to the city of Monmouth," the Supreme Court would take judicial notice that there is a city of Monmouth in Warren county, Illinois, and would presume that to be the city intended: *Harding* v. *Strong*, 42 Ill. 148. But it is the general rule that the higher courts of the state can only notice those civil divisions which are established and prescribed by the legislature. Thus the Supreme Court of Indiana cannot judicially know the names of the townships composing a given county, for the townships are established by the board of county commissioners, not by the legislature: *Bragg* v. *Rush County*, 34 Ind. 406. However, it is permitted them to notice that the state and the township are distinct political organiza-

tions: *LaGrange* v. *Chapman*, 11 Mich. 499. As to how much knowledge is required of points outside the state, the decisions are not entirely harmonious. It has been held that the courts cannot officially know of the existence of a town or city of a specified name, as New Orleans, New York, Janesville, not lying within the state; *Riggin* v. *Collier*, 6 Mo. 568; *Woodward* v. *Railroad*, 21 Wis. 309; *Whitlock* v. *Castro*, 22 Tex. 108; *Richardson* v. *Williams*, 2 Port. (Ala.) 239. But these decisions are not satisfactory, and it is difficult to conceive any substantial reason why courts should be presumed ignorant of the existence and location of those well known centres of traffic and commerce which are so familiar in the every-day parlance of private individuals. And see *Rice* v. *Montgomery*, 4 Biss. 75. At any rate, it is apprehended that this restriction could not be applied to the courts of the United States; for the reasons given above for their judicial knowledge of the laws of various states. And the more important geographical features of the United States, considered as one country, may be judicially noticed; *e. g.* that the state of Missouri is east of the Rocky Mountains: *Price* v. *Page*, 24 Mo. 65. In regard to the length of time required to make a railway journey, or for carriers to transport goods, from one designated city to another, the prevailing doctrine seems to be that a court will require proof, not being able to determine officially what time should be allowed: *Rice* v. *Montgomery*, *supra*. But in a recent Pennsylvania case it was said: "We apprehend that the ordinary speed of railway trains is a matter for judicial cognisance, and hence a very simple calculation will demonstrate with approximate certainty the time within which mails may be transported between such cities as New York and Pittsburgh;" and hence an instruction that "there was nothing improbable in the idea that a notice of protest could reach Pittsburgh the day following the maturity of the note," was not erroneous; although "perhaps the learned [trial] judge went too far in stating that a train leaving New York at five or six in the evening would reach Pittsburgh the next morning at eight:" *Pearce* v. *Langfit*, 101 Penn. St. 512. And in another instance the court took judicial notice of the usual duration of voyages across the Atlantic by steam or other packet ships, so far as to determine that one who was proved to have taken passage on a particular vessel, which vessel had not yet been heard from after a great lapse of time, must be dead: *Oppenheim* v. *Wolf*, 3 Sandf. Ch. 571.

There are but few cases illustrating the rules of judicial notice as applied to the geographical features of foreign countries, but those cases exhibit an unexpected liberality. Thus the Louisiana court once took notice that the river Mersey in England is filled with salt water, the tide ebbing and flowing therein to a great height: *Whitney* v. *Gauche*, 11 La. Ann. 432. And in the case of *The Peterhoff*, Blatchf. Prize Cas. 463, the court even went so far as to take judicial notice of the situation of a town in a foreign country, and that a bar exists at the mouth of the river on which that town lies, which vessels of the draught of the ship in suit cannot cross.

XIII. *Customs and Usages.*—Whenever a custom is public, general and notorious, it will be judicially noticed by the court without proof. This is true, for example, of the custom of merchants to charge interest on their accounts after six months: *Koons* v. *Miller*, 3 W. & S. 271; *Watt* v. *Hoch*, 25 Penn. St. 411. And so of ordinary and familiar abbreviations, such as "admr" for "administrator:" *Moseley* v. *Mastin*, 37 Ala. 216. But not where the custom is confined to a particular trade, with which the court cannot reasonably be supposed to be acquainted. Thus the court cannot know officially the meaning of printers' marks at the foot of an advertisement, and, in the absence of further proof upon the subject, will not infer that such marks indicate the date and number of times a notice has been published: *Johnson* v. *Robertson*, 31 Md. 476. The court will take judicial notice of the wages of ordinary labor: *Bell* v. *Barnet*, 2 J. J. Marsh. (Ky.) 516.

XIV. *Matters of Political Economy and Conclusions of Science.*—The different classes of notes and bills in circulation as money at a particular time will also be judicially noticed: *Hart* v. *State*, 55 Ind. 599. It is in accordance with this principle that the Massachusetts court said: "We must take notice, in common with the people, that bank notes derive their value not only from the certainty but the facility of payment; consequently that a man in trade in Boston, holding a bill issued by a bank at a distance from Boston, can less easily obtain payment than he could if the issuing bank was near to him: and that the different facility of procuring payment of different bills may create a difference in their value:" *Jones* v. *Fales*, 4 Mass. 252. The courts will also recognise the legal coins made at the United States mint pursuant to law, and such foreign coins as are made current by law. Hence, in prosecutions for counterfeiting, it is not necessary to prove that there are

genuine coins of which those alleged to have been made are imitations: *United States* v. *Burns*, 5 McLean 23.

It is not error to instruct the jury that they may infer that gin is intoxicating, without any evidence of its properties or qualities: *Commonwealth* v. *Peckham*, 2 Gray 514. And the same is true of whiskey: *Egan* v. *State*, 53 Ind. 162. But not of malt liquors: *Shaw* v. *State*, 56 Ind. 188. But whether or not benzine is of a like nature with camphene or spirit gas, is not a matter of which the court can take judicial notice; it must be left to the jury: *Mears* v. *Insurance Co.*, 92 Penn. St. 15. But the court will notice the magnetic variation from the true meridian: *Bryan* v. *Beckley*, 6 Litt. (Ky.) 91. And so of the art of photography, the mechanical and chemical principles employed, the scientific principles on which they are based, and their results: *Luke* v. *Calhoun Co.*, 52 Ala. 115. And finally, the court will take judicial notice of the construction and uses of that useful instrument, the ice-cream freezer: *Brown* v. *Piper*, 91 U. S. 37

H. CAMPBELL BLACK.

Williamsport, Pa.

RECENT AMERICAN DECISIONS.

Circuit Court, E. D. Missouri.

STATE OF MISSOURI EX REL. BALTIMORE & OHIO TELEGRAPH CO. *v.* BELL TELEPHONE CO.

A., a Massachusetts corporation, and the owner of a patent on a telephone, licensed B., a Missouri corporation, to do the telephone business of St. Louis, upon condition that B. should not establish telephonic connection with any telegraph company unless specially authorized by A. A. permitted B. to establish telephonic connection with the Western Union Telegraph Company. Thereafter the Baltimore & Ohio Telegraph Company applied for a mandamus to compel B. to permit telephonic communication between it and the petitioner. A. was not made a party: *Held* (1), that A. was not a necessary party; (2) that all other telegraph companies were entitled to the same privilege granted the W. U. Co., upon paying the same price; and that the petitioner was entitled to the relief asked. TREAT, J., dissenting

APPLICATION for a mandamus.

Garland Pollard, for petitioner.

E. T. Allen, for defendant.